BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I

OPINIONS OF THE COURTS BELOW

The opinions of the District Court are not officially reported. They are found in the record on pages 40-44.

The opinion of the Circuit Court of Appeals is not officially reported. It is found in the record on pages 49-53.

II

JURISDICTION

The jurisdiction of this Court is invoked under Sec. 240 (A) of the Judicial Code (28 U. S. C. 347). The Circuit Court of Appeals has in this case decided an important question of Federal law which has not, but should be decided by this Court (Supreme Court Rule 38 (5) (b)), and has decided this question in a way which is probably in conflict with the applicable principles decided by this Court (Supreme Court Rule 38 (5) (b)).

Judgment was entered in this case by the United States Circuit Court of Appeals on January 15, 1945. (R. 49).

III

STATEMENT OF THE CASE

This case involves the issue whether or not the United States, its agencies and corporations, are required by the

Fifth Amendment to the Constitution to pay just compensation for taking highways belonging to a municipal arm of the State of Tennessee; and, if so, the measure of value where the owner of the highway is under no duty or obligation to its citizens to replace the highways taken.

It arises out of the taking by respondent of 123 miles of highways belonging to petitioner as a result of flooding caused by the construction of a dam by respondent on the French Broad River.

By contract between the parties, approximately 28 miles of highways and bridges were reconstructed or replaced by respondent. The respondent denied liability for taking the remaining 95 miles of highways upon the theory that liability existed only if the owner of the highways could be required to replace them. The contract between the parties reserved this issue for court decision. (R. 10 (10)).

By suit brought in the District Court of the United States for the Eastern District of Tennessee, petitioner sought a declaration of its rights and the measure of just compensation to be applied for the taking of its property by respondent. The respondent answered and motions for summary judgment were filed by both petitioner and respondent.

Affidavits filed in support of these motions show:

(a) That the highways flooded by respondent were the property of petitioner and were used by and useful to it at the time of flooding. (R. 25).

(b) That these highways had a cost of replacement value at the time of taking of $357,658.00; that they cost originally $186,000.00, to which had been added improvements having a value in excess of $250,000.00. (R. 22; R. 26).

(c) That all highways requiring restoration and continuing useful had been restored by respondent at its own expense under the contract between the petitioner and respondent. (R. 25).

The District Court sustained the motion of respondent and held that no liability existed where no restoration could be required of petitioner. (R. 44).

The Circuit Court of Appeals affirmed this holding. (R. 49).

Your petitioner takes the position that this holding denies to petitioner the just compensation to which it is entitled under the Fifth Amendment to the Constitution. If the service properties of a municipality have no value unless there is a continuing need for them, then the greater the actual value taken, the less the liability becomes for the taking. Such a rule introduces a new theory of value and creates unmeasurable confusion.

The established principles require the payment of just compensation measured by value at the time of taking. The new standard proposed in this case for taking municipal service property should be examined by this Court.

IV

ERRORS RELIED UPON

The Circuit Court of Appeals erred in holding that highways are not property susceptible to the ascertainment of fair cash value, and in denying to petitioner the just compensation to which it is entitled under the Fifth Amendment to the Constitution. The Court further erred in holding that liability does not exist for highways taken by a Federal agency except to the extent that the owner may be required to replace the highways taken; and it further erred in holding that in case of a political subdivision just compensation cannot be measured by the same standards as compensation for the taking of purely private property and thereby limiting the liability of respondent to the cost of restoring those highways whose restoration was necessary after the taking had occurred.

V

ARGUMENT

1. This case involves an important question of Federal law which has not been but should be settled by this Court.

In the earlier stages of development of this country, many roads and bridges were constructed by private capital and operated as toll roads. Many of these toll roads and bridges were taken under the power of eminent domain by municipal corporations, and the power of condemnation and measure of value in these cases was the subject of a substantial volume of litigation. (See note 47 L. R. A. (N. S.) 796, *et seq.*)

In Tennessee such a right of condemnation was conferred by Chapter 114 Acts 1917, and sustained in *Williamson Co.* v. *Turnpike Co.* 143 Tenn. 628 (see page 640.).

In such cases physical properties, easements, roadways, bridges, etc. were valued as well as franchise. Income was an important element in the valuation of a franchise. (*Monogahela Navigation Co.* v. *U. S.*, 148 U. S. 312).

But toll roads have largely disappeared, the construction and maintenance of roads now being primarily a service function of states and municipalities. No tolls are charged. Roads are constructed and maintained by public municipal funds ultimately obtained from taxation and thus taxation has supplanted tolls—but physical properties, easements, roadways, bridges, etc. remain physical properties.

Do these physical properties cease to have value when taken by a Federal agency because the owner has substituted taxation for tolls and no direct income for its municipal owner is produced by a highway?

From time to time in the past, roads have been taken from municipal owners by Federal agencies. Always just com-

pensation has been required and paid. That compensation may have been the cost of replacement of a similar road (*Wayne County* v. *U. S.* 53 Ct. Clms. 417); or where a partial taking of a single road was involved, the cost of restoring that road to service (*U. S.* v. *Wheeler Township,* 66 F (2d) 977), (*Bedford* v. *U. S.* 23 F. (2d) 453); or where an unimproved dedicated surface alone was involved, the value of that surface in terms of the value of the surrounding surface (*Benedict* v. *U. S.* 280 F 76); or there may have been a complete substitution of all highways provided for by contract (*Brown* v. *U. S.* 263 U. S. 78); but always compensation was paid.

However, recently, two District Courts (*U. S.* v. *Alderson* 53 F. Supp. 528; *U. S.* v. *Certain Parcels of land,* 54 F. Supp. 667), in addition to the District deciding this case, have denied compensation for the taking of highways upon the theory that such property has no value and the owner suffers no loss unless there is a continuing duty to replace or restore to service the highway taken.

The decision in this case (and the recent District Court cases) finds no support among the textbook writers.

Orgel states the rule to be:

> "In case of non profit making or 'service' properties, cost of replacement is regarded as cogent evidence of value although not as in itself the standard of compensation";
>
> (Orgel on Valuation under Eminent Domain, Sec. 39 p. 122)

and Lewis says:

> "If property has no market value, then it is a question of real or actual value, and every fact bearing upon such value may be shown ———";
>
> (Lewis on Eminent Domain (2nd Ed) Vol. 2, Sec. 478, p. 1052)

and in the recent text American Jurisprudence, it is said:

> "While market value is always the ultimate test, it occasionally happens that the property taken is of a class not commonly bought and sold, as a church or a college or a cemetery or the fee of a public street, or some other piece of property which may have an actual value to the owner, but which under ordinary conditions he would be unable to sell for an amount even approximating its real value. As market value presupposes a willing buyer, the usual test breaks down in such a case, and hence it is sometimes said that such property has no market value. In one sense this is true; but it is certain that for that reason it cannot be taken for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable."
>
> (18 American Jurisprudence, Sec. 247, Eminent Domain)

Thus, the earlier decisions of the lower Federal Courts seem in accord with the text rules, while the later decisions are contrary thereto. The question of just compensation under the Fifth Amendment is a Federal question and where its application to municipal service properties affects so many states and their political subdivisions, it becomes an important question. It has not but should be decided by this Court for the guidance of the public agencies of the states as well as various Federal agencies endowed with the power of eminent domain and now taking public service properties of political subdivisions of the states.

2. The decision of the Circuit Court of Appeals in this case is probably in conflict with the applicable decisions of this Court.

(a) The decision, while recognizing that highways are property within the protection of The Fifth Amendment to the Constitution (R. 51), denies the protection of the Fifth Amendment by holding that highways are not property susceptible to the ascertainment of fair cash value. (R. 52).

It seems impossible to reconcile this holding with the holding of this Court in *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92.

If highways are property within the meaning of the Fifth Amendment, then they can be taken only by payment of just compensation. Those things which may be taken without payment of just compensation are not property within the meaning of the Fifth Amendment. (*U. S.* v. *General Motors Corp.*, decided Jan. 8, 1945, 89 L. Ed. 379).

This Court has held highways to be property. (*St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92). The Circuit Court of Appeals in this case limits recovery to the cost of repairing and relocating such highways as were needed after the flooding of petitioner's territory and denies a recovery for all other highways taken. (R. 52). The result of this holding is that only highways needing repair or relocation are property. This seems to be in direct conflict with the controlling decisions of this Court.

(b) The decision in this case that petitioner is entitled to recover only the cost of relocation and replacement of roads necessary after the flooding of its territory by respondent seems in conflict with other applicable decisions of this Court, including:

(*Olsen* v. *U. S.* 292 U. S. 246)
(*Monogahela Navigation Co.* v. *U. S.* 148 U. S. 312)

(*McCanless* v. *U. S.* 298 U. S. 342)
(*Boston Chamber of Commerce* v. *Boston* 217 U. S. 189)
(*St. Louis* v. *Western Union Telegraph Co.* 148 U. S. 92)

At the date of the taking of the highways here involved, petitioner had physical properties consisting of easements, roadways, bridges, etc. having a cost of replacement value of $357,658.00. These properties cost in excess of $435,000.00. They were used by and useful to petitioner at the time of taking. While petitioner is under no obligation to replace these highways, the affidavits of both respondent (R. 22) and petitioner (R. 26) fix the cost of replacement at $357,658.00.

These are the only highways involved. Those highways which needed replacement or continued useful have been replaced or repaired. The contract between the parties settled liability for such roads. Nothing in that contract limits the rights of petitioner as to roads taken and not replaced or is available as a defense to respondent. (R. 10 (10)). The issue as to highways taken which do not require replacement is left for court settlement. (R. 10 (10)).

To deny to petitioner a recovery of just compensation because petitioner is not required to replace property taken from it seems to measure value by petitioner's future needs rather than by its loss at the time of taking. The fallacy of this theory is immediately apparent if applied to a public service corporation going out of business because its properties are taken. It has no need to replace its properties. It collects their value and distributes it to creditors and stockholders. To measure value by future needs of an owner of property taken is contrary to the decisions of this Court.

Such a holding also determines value after the taking and measures it by the use to which the property taken is put by the taker. Physical properties belonging to petitioner,

used by and useful to it at the time of taking, having a value of $357,658.00 at the time of taking, have both their present usefulness and value extinguished as a result of the use to which the property is put by the taker. To measure just compensation by elements resulting subsequently to and because of the taking, or by value to the taker, seems clearly contrary to the decisions of this Court.

CONCLUSION

Both the Circuit Court of Appeals and the District Court reach their conclusion by reasoning that since petitioner is under no obligation to replace the property taken from it by respondent, and since petitioner is relieved of the duty of future maintenance of the property taken, petitioner is not entitled to recover.

Neither such a line of reasoning nor such a conclusion has been announced by this Court in any previous case. It is seemingly in conflict with the reasoning and conclusions of this Court in many cases involving the measure of just compensation for the taking of private property. Just compensation to a political subdivision of a state ought not to be denied under any such unapproved theory.

It is respectfully submitted that the petition for the writ of certiorari should be granted to the end that the questions presented by the petition may be considered and decided by this Court.

Respectfully submitted.

M. W. EGERTON,
Attorney for Petitioner.